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No. 80-149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MISCELLANEOUS DRIVERS and HELPERS UNION, LOCAL 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

THE PULITZER PUBLISHING COMPANY,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether the Court of Appeals misapprehended and grossly misapplied the appropriate standard of review of an order of the National Labor Relations Board.

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MISCELLANEOUS DRIVERS and HELPERS UNION, LOCAL 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Eighth Circuit

Petitioner Miscellaneous Drivers and Helpers Union, Local 610, affiliated with the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, reported at 618 F.2d 1275.

OPINIONS DELIVERED BELOW

The opinion of Bruce C. Nasdor, Administrative Law Judge, National Labor Relations Board, JD-829-78, is dated December 19, 1978 and appears as Appendix B herein. The decision of the

National Labor Relations Board is reported officially at 242 N.L.R.B. No. 11 (1979), and appears as Appendix C herein. The opinion of the United States Court of Appeals for the Eighth Circuit, is reported officially at 618 F.2d 1275 and appears as Appendix D herein. The Order of the Eighth Circuit denying Petitioner's petition for rehearing has not been officially published and appears as Appendix E herein.

JURISDICTION

The opinion of the Court of Appeals was filed on April 7, 1980. Petitioner's timely petition for rehearing or, in the alternative, for rehearing before the Court en banc, was denied May 6, 1980. This petition for certiorari was filed herein ninety days of May 6, 1980. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes pertinent to the case are Sections 8(a)(1) and (5) of the Labor-Management Relations Act, 29 U.S.C. § 158(a)(1) and (5); and Sections 10(e) and 10(f) of the same Act, 29 U.S.C. § 160(e) and (f), all fully set out in Appendix A herein.

STATEMENT OF THE CASE

This was an unfair labor practice case before the National Labor Relations Board, in which the issue was whether the Respondent, Pulitzer Publishing Company, was a "joint employer" with a newspaper delivery service company (Berberich) which employed members of the Petitioner Union. The Board found that Pulitzer was a joint employer, relying on factors such as Berberich's cost-plus contract with Pulitzer, direct control by Pulitzer supervisors over Berberich drivers, and participation by Pulitzer in Berberich's contract negotiations and grievances with the Union (A. 21, 23).

The Court of Appeals denied enforcement of the Board's order. In its opinion, the Court acknowledged the cost-plus contract, the degree of control which Pulitzer supervisors had exercised over Berberich drivers, and the participation by Pulitzer's director of labor relations in Berberich's most recent contract negotiations with the Union (A. 23). However, the Court ruled that these facts did not "warrant the conclusion that Pulitzer determined labor relations policies and the terms and conditions of employment for Berberich drivers" (A. 34), and that "[t]he totality of the relevant evidence in this case does not support the conclusion that Pulitzer and Berberich are joint employers" (A. 36).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES COURT OF APPEALS

This case was brought before the United States Court of Appeals for the Eighth Circuit by Pulitzer pursuant to Section 10(f) of the Labor-Management Relations Act, 29 U.S.C. § 160(f), alleging that it was aggrieved by a final order of the Board. The Board thereafter petitioned the Court for enforcement of the Board's order pursuant to 29 U.S.C. § 160(e). The complete texts of these statutes are set out in Appendix A herein.

The present Petitioner thereafter moved to intervene in the proceedings pursuant to Rule 15(d), Federal Rules of Civil Procedure, and leave was granted by the Court on June 12, 1979.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit Misapprehended And Grossly Misapplied The Substantial Evidence Test Of Review Of An Order Of The National Labor Relations Board In Holding That Pulitzer And Berberich Were Not Joint Employers.

Section 10(e) of the Labor-Management Relations Act, as amended, 29 U.S.C. § 160(e), provides, in pertinent part, that "[t]he findings of the Board *with respect to questions of fact* if supported by substantial evidence on the record considered as a whole shall be *conclusive.*" (emphasis supplied) This standard of review is commonly referred to as the "substantial evidence rule."

An Appellate Court's review of the Board's findings of fact is governed by this statute and this Court's decision in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951). In *Universal Camera,* Justice Frankfurter, speaking for this Court, reviewed the legislative history in detail and recognized that the reviewing court must examine the entire record, including evidence which militates against the Board's findings, to determine whether there is substantial evidence. Justice Frankfurter further observed in the following often quoted statement:

> "Nor does it [the substantial evidence test] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" (at page 448, emphasis in original)

Justice Frankfurther acknowledged the responsibility of the Courts of Appeals in reviewing Labor Board decisions, but added this caveat:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial

> evidence to support agency findings is a question which Congress has placed in the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been *misapprehended or grossly misapplied."* (at pages 490-491; emphasis supplied)

Petitioner contends that this is one of those "rare instances" warranting review by this Court because the Eighth Circuit applied a legal test to an issue which this Court and other Courts of Appeals have said is a factual issue governed by the substantial evidence rule.

In the case of *Boire* v. *Greyhound Corporation,* 376 U.S. 473, 481 (1964), this Court stated that the issue of whether Greyhound was a joint employer was a factual issue.[1] This principle was subsequently echoed by the Sixth Circuit, *NLRB* v. *Checker Cab Co.,* 367 F.2d 692, 698 (1966); the Fourth Circuit, *NLRB* v. *Jewell Smokeless Coal Co.,* 435 F.2d 1270, 1271 (1970); the Tenth Circuit, *NLRB* v. *Sweet Lumber Co.,* 515 F.2d 785, 793 (1975), cert. den. 423 U.S. 986; and the First Circuit, *NLRB* v. *C.K. Smith & Co., Inc.,* 569 F.2d 162, 164 (1977).

Yet the Eighth Circuit expressly chose to interpret the matter as one of law, rather than fact. Their opinion frames the question as follows:

> "To review whether the Board applied a correct *legal test* in determining that Pulitzer was a joint employer of the

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[1] It should be noted that "joint employers" is not defined anywhere in the Labor-Management Relations Act, 29 U.S.C. § 141 et seq. Cf. *NLRB* v. *Hearst Publications, Inc.,* 322 U.S. 111 (1944), holding that whether or not certain persons were "employees" as defined in Section 2(3) of the Act was a question of fact to be decided by the Board. Petitioner contends that construction of a nonstatutory term such as "joint employer" should, even more so than a statutory term, be left to the expertise of the agency which engendered it.

> Berberich drivers assigned to the Post Dispatch, we must first determine what test the Board applied" (A. 31; emphasis supplied)

In so construing the ultimate issue as one of law, the Court declined to enforce the Board's order:

> "When in our judgment an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the *law,* we must set aside the determination of the Board and deny enforcement of its order" (A. 36; emphasis supplied)

This construction of the "joint employer" issue as one of law rather than fact is directly contrary to this Court's decision in *Boire* and those of the other Circuits cited. It is the Court of Appeals' obligation to adopt as conclusive those findings of the Board which are reasonable and based upon relevant evidence. *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1938). In applying the substantial evidence standard of review, fairly conflicting views and inferences drawn from the evidence must be resolved in favor of the Board's findings. *Manley Transfer Company, Inc.* v. *NLRB,* 390 F.2d 777, 778 (8th Cir. 1968); *NLRB* v. *Condenser Corporation of America,* 128 F.2d 67, 74 (3rd Cir. 1942). Thus, the Board's inferences from the facts may not be disturbed by a reviewing court, even though the evidence is capable of lending itself to different inferences. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 307 (1937).

The Board's ultimate conclusion of joint employer status was drawn from specific and substantial evidentiary facts:

> "Respondent's negotiation of important terms, like fringe benefits and scheduling - in the context of the cost-plus arrangement and Respondent's supervisory control over Berberich's drivers - establishes Respondent as a joint employer with Berberich" (A. 23).

Despite these definite findings, the Court found that this conclusion "does not clearly articulate the standard applied by the Board or the critical factors it considered in determining whether a joint employer relationship existed" (A. 31).

What the Court did was ignore the Board's reasonable findings of fact and instead substituted its judgment under the guise of interpreting a question of law. This was not a case where the Board misquoted the evidence in the record, or where critical evidence was improperly admitted or excluded. It was a case where the substantial established facts were construed by the Board to reach an ultimate, reasonable, *factual* finding that Pulitzer was a joint employer. The finding and the evidence upon which it was based were clearly articulated in the Board's opinion, the Court's unfounded assertion to the contrary notwithstanding.

When the Court of Appeals chooses to ignore a factual finding with which it does not agree on the merits and reverses it by creating and applying its own "legal test", it misapprehends and grossly misapplies the substantial evidence standard of review.

CONCLUSION

This Court in *Universal Camera* declared that it would intervene when the substantial evidence standard appears to have been misapprehended or grossly misapplied. This is such a case.

For these reasons, the Petitioner respectfully submits that the foregoing petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

The text of statutes involved in this case are as follows. All are part of the Labor-Management Relations Act, as amended, 29 U.S.C. §§ 141-187.

Sections 8(a), (1) and (5) 29 U.S.C. § 158(a) (1) and (5):

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

Section 10(e) and (f), 29 U.S.C. & 160 (e) and (f):

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the

Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respet to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of ceriorari or certification as provided in section 1254 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the

United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 14-CA-11019

The Pulitzer Publishing Company

and

Miscellaneous Drivers and Helpers Union, Local 610, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

and

Elsie Berberich and Wilbert W. Berberich d/b/a Berberich's Delivery Co., A Partnership

Party in Interest

Jeffrey E. Hartnett, Esq.,
of St. Louis, MO, for the General Counsel.

Clyde E. Craig, Esq.,
of St. Louis, MO, for the Charging Party.

Michael J. Rybicki, Esq., and *David Bennett Ross, Esq.,*
for the Respondent.

H. Kent Munson, Esq.,
for the Party in Interest

DECISION

Statement of the Case

BRUCE C. NASDOR, Administrative Law Judge: This case was tried at St. Louis, Missouri, on June 5, 6 and 7, 1978. The charge in this proceeding was filed by Miscellaneous Drivers and Helpers Union, Local 610, affiliated with International

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the Union, on December 23, 1977. The complaint in this matter issued on May 9, 1978. The complaint alleges that since December 8, 1977, The Pulitzer Publishing Company, hereinafter referred to as Respondent, violated Sections 8(a)(1) and (5) of the Act by refusing to recognize and/or participate in collective-bargaining with the Union concerning proposed changes in the methods by which the delivering of newspapers was to be accomplished. The issue, a legal one, is whether the Respondent is a joint employer of a unit of employees employed by Berberich Delivery Company, hereinafter referred to as Berberich. If such a joint-employer relationship exists then Respondent is legally obligated to bargain in good faith with the Union.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and after due consideration of briefs, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is engaged at 900 North 12th Street, St. Louis, Missouri, in the publication, sale and distribution of a newspaper, advertisements and related products. During the year ending December 31, 1977, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $200,000 from the publication of a daily newspaper and subscribed to interstate news services, the value of which services is in excess of $10,000, and regularly advertises nationally sold products, the value of which advertisements is in excess of $10,000. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization

The Miscellaneous Drivers and Helpers Union, Local 610, affiliated with International Brotherhood of Teamsters, Chaufeurs, Warehousemen and Helpers of America, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Facts

Respondent publishes a daily and Sunday newspaper known as the St. Louis Post-Dispatch which is distributed in the metropolitan St. Louis area. It has two dock facilities and a dispatcher shack where the driver employees of Berberich come to pick up the newspapers and distribute them to Respondent's customers.

Berberich Delivery Company maintains two facilities, one at 13th and Shenandoah Street in downtown St. Louis, and the other at Fee Fee Road in north St. Louis County. It is a family partnership, and maintains contractual relationships with Respondent and the Globe-Democrat which competes with Respondent. Berberich provides the delivery service of Respondent's newspapers. There are no interlocking officers or directors of either Respondent or Berberich and Respondent has no financial interest in Berberich nor does Berberich have any financial interest in Respondent.

Respondent conducts labor relations including grievances and collective bargaining through Marvin G. Kanne, Director of Labor Relations. Approximately 11 labor organizations represent various of Respondent's employees, including Local 610, which represents the dockmen employed by the Respondent at its loading docks. Local 610 also represents Berberich's drivers. Berberich decides how many employees it will employ. Its trucks which are used for the delivery of Respondent's newspaper, bear a logo indicating that the Post is being delivered.

The record reflects that on a typical work day Berberich's drivers pick up their trucks at the facility owned by Berberich and proceed to a facility owned by Respondent where they pick up newspapers for delivery. Presently drivers receive a "run sheet" from an assistant manager, a Berberich employee, who directs drivers where to proceed to pick up the newspapers. The assistant manager receives the "run sheet" from a dispatcher who is employed by the Respondent. Prior to July 1, 1977, drivers followed the same basic procedure, but they received their "run sheet" directly from the Post dispatcer. After that date, the position of assistant manager was created. Before hiring six assistant managers, Berberich discussed their salary, $15.000 per year, with Respondent.[1]

Respondent's dispatchers maintain records on each driver's runs. When a driver finds it necessary to call the dispatcher shack, he talks to Respondent's dispatcher rather than an assistant manager. Drivers carry the dispatcher's phone number in the event of a problem such as a breakdown or a shortage of newspapers.

Respondent employs "recovery men" who ride in the truck with Berberich drivers to give out new additions to street venders, and take back unsold additions and collect money. The "recovery man" tells the driver what route to take in order to complete his pickups.

On some occasions, although infrequent, Respondent's pressroom employees have accompanied Berberich's drivers delivering printing plates. Respondent has also utilized Berberich's employees and trucks to move furniture and Berberich has stored Respondent's T.V. remote truck in its facility, which again, although infrequently, was driven by a Berberich driver.

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[1] Berberich is reimbursed the $90,000 by Respondent.

Respondent and Berberich have a cost-plus contract. Under the terms of this contract, Respondent reimburses Berberich for all salaries, fringe benefits, medicare, health and welfare contributions. If Berberich for any reason, ceases to be the contract hauler for Respondent, the Respondent shall reimburse Berberich "for all accrued benefits, severance pay liability and each and every other commitment or liability which arises out of Berberich's collective-bargaining agreement and all other addenda, supplements or modifications thereto, whether written or oral." Respondent pays 7 percent of the gross payroll of the drivers, assistant managers and garage attendants to cover social security taxes. Berberich is required to maintain workmen's compensation, public liability, and property damage insurance coverage and Berberich assumes responsibility for any liability for loss or injury to life or property caused by any of its employees. In the event of a strike of Berberich employees, which would prevent Berberich from performing pursuant to the contract, Respondent agrees to continue to pay expenses attributable. Adjustments may be made in the cost structure on a year-to-year basis. The contract also provides that nothing contained therein shall be construed to suggest that the parties, Berberich and Respondent, are general partners, limited partners, joint ventures of joint employers.

Presently, Berberich is reimbursed for the cost of legal counsel to represent it in business affairs. At some time prior, Berberich used Respondent's attorneys at no cost to it.

Record testimony reveal that at least since 1961, Berberich and the Union have been parties to several collective-bargaining agreements. Moreover, during the negotations leading up to the execution of said collective-bargaining agreements, representatives of Respondent were present, and actively participated in

the negotiations.[2] During the negotiations for the 1976-1978 agreement, representatives of Respondent were not present until October 4, 1976, the day that the parties reached final agreement. On that date Marvin Kanne, Director of Labor Relations for Respondent, appeared and according to testimony by Harland Horn, secretary-treasurer and business agent for the Union, Kanne made various proposals including wage proposals. Kanne denied that he made any proposals and testified that he was present for the purpose of explaining the productivity bonus contained in the contract. According to the testimony of John Metz, president of the Local, Kanne involved himself in discussions relating to the contract. Counsel for the charging party in his brief states that no Berberich representative was present at the final session. This is incorrect as the record reflects that Attorneys Siegle and Spoehrer were present to represent Berberich.

The record is satiated with documentary evidence, including correspondence between Respondent and the Union, and Respondent and Berberich, relating to Berberich's drivers. There are also addenda to collective-bargaining agreements signed by representatives of the Respondent, and documents reflecting that Respondent, acting through the Newspaper Publisher's Association, was directly involved in grievances concerning Berberich's drivers.[3] For example, there are records

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[2]. During negotiations in 1973, Respondent's Director of Labor Relations submitted to Horn, the union representative, a document entitled, "Publishers 1973 Contract Proposals." It states, *inter alia:* "a few of the proposals which the publishers feel are a 'must' in order to increase our flexibility and enable us to survive are set forth below."

A perusal of the document reflects that the proposals deal with rates, hours and working conditions of drivers.

[3] The Newspaper Publisher's Association was located in Respondent's building.

of arbitration hearings, and a brief prepared by the St. Louis Newspaper Publisher's Association, for and on behalf of, Berberich. The cases involved arbitration proceedings between the Union and Berberich. Representing the St. Louis Newspaper Publisher's Association was Munro Roberts, an employee of Respondent.

An over-view of the documentary evidence reveals the following: (1) Letters to and from Respondent to the Union giving assurances, that during the term of the contract between Berberich and the Union, the Respondent will preserve union members work (known as "stop letters"); (2) Addenda to contracts signed by Kanne, requesting certain load limits being tolled in the delivery of the newspapers, reference is also made to an understanding expressed in negotiations for the new collective-bargaining agreement 1976-1978, and that the drivers' stewards had a right to discuss the issue with management;[4] A letter from the Respondent's circulation manager to the Union, outlining delivery operations for Respondent's new plant, wherein Respondent through its circulation manager also assures the Union that no drivers will be laid off nor will any stops be removed; (4) There are also various letters from Respondent's management personnel to union representatives, concerning Berberich's employees and relating to issues such as sick leave, pensions, contract negotiations, deliveries, contract proposals, and disposition of grievances.

Until sometime early in 1977, drivers or their steward would take their grievances and problems to Berberich. If agreement could not be reached with Berberich, the Union would ask for a meeting with representatives of Respondent. The Union would meet before a joint standing committee comprised of union peo-

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[4] Although Respondent contends it did not participate in negotiations for the 1976-1978 collective-bargaining agreement, these references are still in the addenda attached to that contract.

ple and individuals from the Respondent's Labor Relations department. Then Director of Labor Relations, Trent, would present Berberich's position.

In early 1977, Berberich informed Union Representative Horn that in the future, any problems would have to be settled with Berberich.

On October 3, 1977, the Union wrote to Berberich and Respondent, Kanne's attention, setting forth its position that Respondent and Berberich were joint employers, requesting an opportunity to bargain concerning changes or contemplated changes in the wages, hours and working conditions of certain employees, including Berberich's drivers. Respondent rejected the Union's joint-employer contention, and responded that it had no obligation to bargain with the Union as the representative of Berberich's employees.

Analysis and Conclusions

The facts in this case are essentially undisputed. The only area of divergence is the testimony of Kanne, where he denied that he made any proposals during the 1976 negotiations, but was merely present for the purpose of explaining a productivity bonus. This, as contrasted to the testimony of union representatives, Horn and Metz, that Kanne involved himself in discussions relating to the contract and made various proposals, including wage proposals. I do not think the ultimate conclusions reached, rise or fall on this conflict, but, I do resolve said conflict in favor of Metz and Horn, and I discredit Kanne's testimony in this area. I believe this credited testimony tends to show a continuing pattern on the part of Respondent, to exert control over Berberich's labor relations.

The record in this case amply demonstrates that at the very least, Respondent shares the control over labor policies, affecting the drivers who work for Berberich. The Board considers labor relations factors critical in confronting a joint-employer issue. *The Southland Corporation,* 170 NLRB 1332.

Respondent points out that Berberich hires, fires, and disciplines its drivers without Respondent's participation. Although this is supported by the record, and while Respondent's control of the drivers' day-to-day work is not as extensive as Berberich's, it is substantial. See, *Lowery Trucking Co.*, 177 NLRB 13.

In my opinion, the employment of assistant managers and the change in the form of processing grievances in 1977, are changes in form rather than substance. The other criteria of joint-employer status, are sufficient enough to weigh heavily in favor of such a finding.

Although I don't completely agree with the General Counsel, that the terms of the cost-plus contract totally eliminate the normal entrepreneurial risk factor, I do believe that the contract demonstrates a reciprocal financial dependence between Berberich and Respondent.[5] The cost-plus contract plays a significant role in my concluding that Berberich and Respondent are joint employers. It seems to me, that, Respondent is the very raison d'etre for Berberich's existence. One can readily see why Respondent would be more than remotely interested in the wages, hours, and working conditions of Berberich's employees. Respondent's concern is graphically demonstrated in the "Publisher's 1973 Contract Proposals," where it exposes the fragility and vulnerability of its position. Although Respondent argues that the mass of evidence involves pre-1976 matters, I am not persuaded by the record that the mutual dependence between Respondent and Berberich is presently any less tenuous. I believe the situation involving Berberich's hiring of assistant managers further illustrates the control exercised by Respondent. The hiring of six assistant managers costs Respondent $90,000 per year and Berberich could not get involved in such an undertaking, without first discussing it with Respondent.

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[5] The cases applying joint-employer criteria do not involve cost-plus contracts, thus shedding no light on this element.

I am constrained to conclude on the basis of the totality of the evidence that Respondent is a joint employer with Berberich, and as such, has refused to bargain with the Union in violation of Sections 8(a)(1) and (5) of the Act.

Respondent argues that, even if a joint-employer relationship once existed, there is insufficient evidence to establish such a relationship or bargaining obligation during the 10(b) period. The facts in the instant case reveal a violation of the Act, within the 10(b) period. Relevant evidence as to the existence or non-existence of a joint-employer relationship should not be limited to the 6-month 10(b) period. Rather, pre-10(b) and post-10(b) events and circumstances are relevant and admissible. See, *Bryan Manufacturing Company,* 362 U.S. 411.

Respondent avers that the General Counsel has failed to prove the appropriateness of the unit alleged. The question of the appropriateness of the unit, in the context of this case, is a legal question in the same sense as the joint-employer issue. Respondent's denial of the appropriateness of the unit is consistent with its legal arguments relative to the joint-employer issue. No evidence was produced to reflect or demonstrate a lack of community of interest or any other factors which would prove that the unit is inappropriate. Based on the contract and the history of bargaining, I find and conclude that the unit alleged in the complaint is an appropriate unit.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent and Berberich are, and at all times material herein have been, joint employers of the employees in the unit described below.

3. All drivers, helpers, bundle boys, television truck drivers, roll paper drivers, mechanics, garage attendants and rack repairmen performing work relating to the distribution of the St. Louis Post-Dispatch, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. At all times material herein, the Union has been the duly selected representative, for the purposes of collective bargaining of the employees in the unit described above, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. By refusing to bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit, Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act.

The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act, I shall recommend it be Ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

The violations committed by the Respondent, do not go to the very heart of the Act, nor do they demonstrate a proclivity to violate the Act. Accordingly, in my recommended Order, I will use the narrow cease and desist language, "In any like or related manner."

I shall recommend that Respondent be Ordered to bargain with the Union as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, and terms and conditions of employment.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[6]

ORDER

The Pulitzer Publishing Company, the Respondent herein, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit described below.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

(c) The appropriate bargaining unit is:

All truck drivers, helpers, bundle boys, television truck drivers, roll paper drivers, mechanics, garage attendants and rack repairmen performing work relating to the distribution of the St. Louis Post-Dispatch, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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[6] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Henceforth, upon request of the Union bargain collectively, with the Union, over wages, hours, and working conditions, and any other terms of employment of the employees in the appropriate unit described above.

(b) Post at its premises, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereater, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of the receipt of this Decision, what steps it has taken to comply herewith.

Dated, Washington, D. C. December 19, 1978.

/s/ Bruce C. Nasdor
Administrative Law Judge

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[7] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency Of The United States Government

After a trial in which all parties had an opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has Ordered us to post this notice and to carry out its provisions.

WE WILL NOT refuse to bargain with Miscellaneous Drivers and Helpers Union, Local 610, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), over wages, hours and working conditions in the unit of employees which is: All truck drivers, helpers, bundle boys, television truck drivers, roll paper drivers, mechanics, garage attendants and rack repairmen performing work relating to the distribution of St. Louis Post-Dispatch, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

WE WILL, upon request, meet with and bargain collectively with the Union as the collective-bargaining representative of the employees in the unit described above.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act.

THE PULITZER PUBLISHING COMPANY

(Employer)

Dated _____ By _____
(Representative) (Title)

This Is An Official Notice And Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 210 North 12th Blvd. - Rm. 448, St. Louis, Missouri 63101, Telephone (314) 425-4361.

APPENDIX C

242 NLRB No. 11

FPT
D—5013
St. Louis, Mo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Case 14—CA—11019

The Pulitzer Publishing Company

and

Miscellaneous Drivers And Helpers Union, Local 610, Affiliated With International Brotherhood Of Teamsters, Chauffeurs, Warehousemen And Helpers Of America

DECISION AND ORDER

On December 19, 1978, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge as modified herein and to adopt his recommended Order.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge found that Respondent and Berberich's Delivery Company (herein Berberich)[2] were joint employers and, therefore, that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and participate in collective-bargaining negotiations with the Union which represents certain of Berberich's employees. We agree, for the reasons set forth below, with the Administrative Law Judge's conclusion that Respondent and Berberich are joint employers and that a violation of Section 8(a)(5) of the Act has been established in this proceeding.

The essential facts are not in dispute. Respondent publishes "The St. Louis Post-Dispatch." Berberich, pursuant to a cost-plus contract, delivers Respondent's newspaper throughout metropolitan St. Louis.[3] Under the contract, Respondent reimburses Berberich for all salaries, fringe benefits, medicare, and health and welfare contributions, as well as social security and other taxes. It also pays Berberich's legal fees. In fulfilling the contract, as explained in greater detail by the Administrative Law Judge, Berberich's drivers are supervised in part by Respondent's dispatchers and "recovery men." The dispatchers have in the past assigned routes and authorized overtime, although, since July 1977, the dispatchers have usually given these directions through the intermediary of an assistant

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[2] Elsie Berberich and Wilbert W. Berberich d/b/a Berberich's Delivery Co., a Partnership, appeared at the hearing as Party in Interest.

[3] Berberich also delivers Respondent's competitor, "The St. Louis Globe-Democrat." Berberich has a total of 114 employees, including drivers and mechanics. Approximately 55 of these employees are assigned exclusively to the delivery of Respondent's competitor, while the remainder are assigned exclusively to the delivery of the Post-Dispatch. Thus, we do not agree with the Administrative Law Judge that Respondent is the *"raison d'etre"* for Berberich.

manager, who is employed by Berberich. The record shows no instance, however, where the Berberich manager has, in any manner, refused or failed to transmit a dispatcher's instruction.

Berberich's drivers and mechanics are represented in two separate collective-bargaining agreements by the Union—one for Post-Dispatch drivers and mechanics and one for Globe-Democrat drivers and mechanics.[4] The Union has represented the drivers since 1947, and has negotiated with Berberich since 1961. Prior to 1961, the drivers were working for a predecessor company that delivered Respondent's newspaper.

The Union herein, in addition to representing Berberich's employees, also represents a unit of dockmen who work for Respondent. Until 1967, the dockmen and Berberich's drivers were covered by one agreement signed by both Respondent and Berberich. Since 1967, however, the agreements have been separate. Nevertheless, the record shows, and Respondent admits, that, at least from 1961 until 1974, Respondent negotiated terms and conditions of employment for Berberich's employees. Respondent also participated in resolving grievances involving Berberich until early 1977.

Respondent contends, however, that since early 1977 its relationship with Berberich has changed such that it is no longer involved in supervising Berberich's drivers on a daily basis, or in establishing their terms and conditions of employment either by negotiating the contract or by resolving grievances. In support of this contention, it notes that Berberich's supervisors now

[4] Only the Post-Dispatch drivers and mechanics are at issue here.

work at the loading dock at Respondent's plant,[5] and that Berberich is now solely responsible for settling grievances. It also excepts to the Administrative Law Judge's finding that at a meeting on October 4, 1976, it participated in negotiations which resulted in the current collective-bargaining agreement between Berberich and the Union. Moreover, it argues that it is not a joint employer with Berberich since neither party has any ownership interest in the other, and because the cost-plus contract, as found by the Board in *Cabot Corporation,*[6] does not, in and of itself, establish joint employer status.[7]

As stated earlier, we have decided to adopt the conclusion of the Administrative Law Judge that Respondent is a joint employer with Berberich. Unlike the Administrative Law Judge, however, we do not place as heavy reliance on Respondent's cost-plus arrangement with Berberich in so concluding. Rather, in finding that Respondent is a joint employer with Berberich, we rely on the totality of evidence and note significantly Respondent's demonstrated authority to determine labor relations policies and terms and conditions of employment for Berberich's drivers.

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[5] Respondent was consulted by Berberich in the hiring of these supervisors pursuant to the cost-plus contract. We note that there are six supervisors. Three of the new supervisors supervise the drivers who deliver Respondent's newspaper, while the other three supervise the drivers who deliver Respondent's competitor. Thus, the Administrative law Judge erred in concluding that Respondent paid $90,000 for the salaries of the six supervisors. Respondent only paid its *pro rata* share, or $45,000.

[6] *Cabot Corporation and Payne and Keller of Louisiana, Inc.*, 223 NLRB 1388 (1976), enfd. 561 F.2d 253 (D.C.Cir. 1977).

[7] We note that the Administrative Law Judge inadvertently stated that there were no Board Decisions on joint employer status which involve cost-plus contracts. The relevant decisions are noted above and below.

In this latter regard, the Administrative Law Judge credited the testimony of Union Representatives Harland Horn and John Metz (and the record amply supports his findings) that, at the final negotiating session on October 4, 1976, for the 1976-78 agreement between the Union and Berberich, Respondent's director of labor relations, Marvin Kanne, negotiated with representatives of the Union on the issues which were holding up a final agreement. The most important topic was a productivity bonus for Berberich's drivers. In addition, Kanne also discussed better cooperation from the drivers, and he proposed changes in the system by which drivers bid on routes, as well as changes in scheduling to eliminate part-time work on Saturday nights. Berberich did not send a representative to this meeting, rather, it allowed Respondent, through Kanne, to handle these final negotiations.[8] As a result of the October 4 meeting, agreement was reached on a new contract. That contract, with accompanying letters from Respondent, was ratified on October 18, 1976, and remained in effect until August 31, 1978.[9]

Respondent's negotiation of important terms, like fringe benefits and scheduling—in the context of the cost-plus arrangement and Respondent's supervisory control over Berberich's drivers—establishes Respondent as a joint employer with Berberich. Its participation in negotiations also distinguishes the instant case from *Cabot, supra,* and the other cost-

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[8] Thus, the Administrative Law Judge mistakenly concluded that Berberich was represented by attorneys Siegle and Spoehrer at the meeting. Siegle was not present at the negotiating session. Spoehrer was there, but he was representing the Globe-Democrat.

[9] By separate letters of October 18, 1976, Kanne also assured Berberich, *inter alia,* that Respondent would continue to discuss safety problems with the Union, and that Respondent would install a motorized conveyor belt, as requested by the Union.

plus cases cited by Respondent,[10] for, in those cases, the respondent corporations had no such role.[11]

Finally, Respondent argues that the unfair labor practice charge, filed on December 23, 1977, was barred by Section 10(b) of the Act because Respondent allegedly first announced to the Union it would not bargain about Berberich's employees in 1976. We find no merit to this argument, however, because it is clear that, whenever Respondent first allegedly announced a purported refusal to bargain,[12] Respondent unequivocally stated a refusal to bargain within the 6-month period preceding the filing of the instant charge.[13] In sum, we conclude that Respondent's refusal to bargain with the Union when requested to do so violated Section 8(a)(5) of the Act.

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[10] *Oil, Chemical and Atomic Workers International Union, AFL-CIO, and its Local Union No. 4—23 (Firestone Synthetic Rubber & Latex Company, Division of the Firestone Tire and Rubber Company),* 173 NLRB 1244 (1968); *Mobil Oil Corporation,* 219 NLRB 511 (1975).

[11] In *Russom* v. *Sears, Roebuck and Co.,* 558 F.2d 439 (1977), affg 415 F.Supp. 792 (D.C.Mo., 1976), *cert. denied* 434 U.S. 955 (1977), the Eighth Circuit recently recognized the importance of this factor in establishing joint employer status. Thus, in affirming a district court finding that Sears was not a joint employer, it stated:

> Most significantly, the record reflects that Sears did not sign any contract between DAS and Local 610 and that Sears did not participate in any labor negotiations which preceded formation of such a contract.

The participation of Respondent in negotiations in the instant case weighs heavily for the opposite finding which we make here.

[12] While Respondent apparently argues that it told the Union in August 1976 that it would not bargain about Berberich's employees, we note the credited testimony, *supra,* that its director of labor relations engaged in such bargaining in October 1976.

[13] *Pittsburgh-Des Moines Steel Company,* 202 NLRB 880, 891 (1973).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, The Pulitzer Publishing Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. May 7, 1979.

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1433

The Pulitzer Publishing Company, Petitioner, v. National Labor Relations Board, Respondent. Miscellaneous Drivers and Helpers Union, Local 610, Intervenor-Respondent.	Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Submitted: December 6, 1979
Filed: April 7, 1980

Before GIBSON, Chief Judge,* LAY and McMILLIAN, Circuit Judges.

GIBSON, Senior Circuit Judge.*

* The Honorable Floyd R. Gibson was Chief Judge of the Eighth Circuit at the time this appeal was heard, but took senior status on December 31, 1979, before the opinion was filed. The Honorable Donald P. Lay, Circuit Judge at the time the appeal was heard, is now Chief Judge of the Eighth Circuit.

Pulitzer Publishing Company petitions to set aside an order of the National Labor Relations Board entered May 7, 1979, holding that Pulitzer and Berberich's Delivery Company were joint employers and that, therefore, Pulitzer's refusal to recognize and participate in collective bargaining negotiations with the Miscellaneous Drivers and Helpers Union, Local 610 (Union), which represents certain of Berberich's employees, constituted a violation of section 8(a)(5) and (1) of the National Labor Relations Act (N.L.R.A.), 29 U.S.C. § 158(a)(5) and (1) (1976). The Board cross-applies for enforcement of its order. We grant the petition to set aside the order, and deny its enforcement.

Pulitzer publishes a daily and Sunday newspaper, the St. Louis Post Dispatch, which is distributed in the metropolitan St. Louis area. Berberich is a family partnership which maintains contractual relations to provide delivery service of both the St. Louis Post Dispatch and its competitor, the Globe Democrat. At all relevant times, Berberich's dockmen and drivers were members of a collective bargaining unit represented by the Union.

Delivery operation begins when Berberich drivers punch in and pick up their trucks at a Berberich-owned facility. They drive to one of the Post Dispatch's two loading docks and report to a Berberich assistant manager stationed there, who directs them to the appropriate dock to pick up newspapers and provides them with a "run sheet" identifying the stops to be made during the day. The drivers then deliver the papers according to the run sheet. If, during the course of delivery, they encounter any difficulties, they report to the Berberich assistant manager or occassionally to a newspaper dispatcher in the loading dock area. Occasionally, a Post Dispatch employee rides a Berberich truck, either to familiarize himself with the operations or to retrieve unsold newspapers. On a few isolated occasions, a Post Dispatch dispatcher has asked a driver to

work through his lunch period, and a Post Dispatch foreman, on Fridays, exercises some control over the Berberich "mail room" truck. [-2-]

Prior to 1961, Berberich was a member of a multi-employer association which included, among others, Pulitzer and the Globe Democrat Publishing Co. Since 1961, however Berberich has separately executed a collective bargaining agreement with the Union to cover the Berberich drivers who deliver the Post Dispatch. Pulitzer has also had a separate bargaining relationship with the Union covering its own dockmen. From 1961 through 1974, representatives of the Post Dispatch actively participated in the negotiation of contracts between Berberich and the Union regarding Berberich's Post Dispatch employees.

During the contract negotiations for 1976, Pulitzer claims that it did not participate in negotiations between Berberich and the Union. The evidence of Pulitzer's involvement consisted primarily of the presence of Pulitzer's director of labor relations, Marvin Kanne, at the October 4, 1976, bargaining session. Kanne had been invited to appear by counsel for the Globe Democrat in order to explain a productivity bonus that had been negotiated between the Post Dispatch and its own dockmen. He testified that he explained the bonus and denied having entered into negotiations in any sense of the term. Two union witnesses, however, testified that in addition to the productivity bonus Kanne also discussed the Post Dispatch's desire for better cooperation from the drivers, the system for bidding on routes, and the possible elimination of some part-time work. No Berberich representative was present at this meeting, although it was the final bargaining session before the production of a new contract. Thereafter, Kanne wrote letters to the Union promising, *inter alia,* that the drivers' work would be preserved, and to Berberich indicating, *inter alia,* that the Post Dispatch would continue to discuss safety problems with the Union and would install a motorized conveyor belt. [-3-]

Prior to 1977, Berberich employees initially discussed grievances with Berberich, but if agreement was not reached the grievance was taken to a joint standing committee consisting of representatives of the Union and the Post Dispatch. If the grievance went to arbitration, the St. Louis Newspaper Publishers Association, using an employee of the Post Dispatch, would represent Berberich. In early 1977, Berberich informed the Union that all future grievances would have to be resolved exclusively with Berberich. Since that time, all grievances concerning drivers have been submitted to Berberich.

On October 3, 1977, the Union wrote Berberich and Pulitzer, contending that they were joint employers, and requested an opportunity to bargain concerning changes or contemplated changes in wages, hours, and working conditions of certain employees, including Berberich's drivers. Pulitzer rejected the contention that it was a joint employer of Berberich's drivers and refused to bargain with the Union. The Union filed an unfair labor practice charge with the NLRB on December 23, 1977. A complaint issued and the case was tried before an administrative law judge (ALJ) on June 5, 6 and 7 of 1978. The ALJ found that Pulitzer had violated section 8(a)(1) and (5) of the N.L.R.A. by refusing to recognize and/or participate in collective bargaining with the Union concerning proposed changes in the methods by which the delivering of newspapers would be accomplished. He resolved the legal issue of whether Pulitzer is a joint employer of the Berberich drivers in the affirmative, and recommended that Pulitzer be ordered to bargain with the Union. The Board, on May 7, 1979, adopted the ALJ's recommended order and affirmed with modification his rulings, findings, and conclusions.[-4-]

Pulitzer argues that the Board erred in its determination that Pulitzer was a joint employer of the Berberich drivers on October 3, 1977, (the crucial date for determination of joint employer status) because it applied the wrong legal test and its factual findings are not supported by substantial evidence on

the record as a whole. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-91 (1951).

Initially, Pulitzer argues that because the Board did not totally accept the findings of the ALJ, this disagreement renders the evidence somehow "less substantial." *See Royal Typewriter Co.* v. *NLRB,* 553 F.2d 1030, 1042 n.12 (8th Cir. 1976). In reviewing the ALJ's decision, the Board specifically affirmed the credibility findings of the ALJ. It did correct a number of technical inaccuracies in the fact statements made by the ALJ and disagreed with some of the conclusions he drew from the facts.[1] Although this disagreement may obscure the legal reasoning and analysis underlying the Board's determination, in the sense that the Board's reliance upon different facts from those relied upon by the ALJ undercuts the legal basis for the ALJ's determination, the corrections made by the Board do not in any way undermine the credibility findings of the ALJ or the basic factual determinations made by the Board.

Pulitzer also apparently objects to the admission or consideration of certain evidence presented at the hearing before the administrative law judge. It claims that the actions of the

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[1] The Board found, contrary to the ALJ, that Pulitzer could not be considered the "raison d'etre" for Berberich because, of Berberich's total 114 employees, approximately 55 are assigned exclusively to the delivery of Pulitzer's competitor, the Globe Democrat. The Board also noted that the ALJ erred in stating that Pulitzer paid $90,000 for the salaries of the six supervisors. Pulitzer only paid its pro rata share of $45,000. The Board corrected the ALJ's statement that Berberich was represented by two attorneys at the October 4 meeting, noting that one of the attorneys mentioned was not present, and the other was there in the capacity of representing the Globe Democrat. The Board also disavowed the ALJ's heavy reliance on the form of Pulitzer's arrangement with Berberich. It noted that the ALJ had "inadvertently stated that there were no Board Decisions on joint employer status which involve cost-plus contracts." In fact, there are relevant decisions which interpret the cost-plus arrangement differently from the ALJ. [-5-]

parties in 1956, 1966, or 1976 are not relevant to the issue of whether it was a joint employer on October 3, 1977, and that the Board improperly focused on the activities of a different era. In effect, Pulitzer appears to argue that all the evidence prior to the statutory six-month limitation period for filing an unfair labor practice charge, 29 U.S.C. § 160(b) (1976), cannot be relevant. This argument is meritless. It is clear that the challenged evidence may be used to shed light on the nature of the relationship between Berberich and Pulitzer as it existed at the time of the bargaining demand even though it may not be used to establish the events constituting the alleged unfair labor practice, *Local Lodge No. 1424, International Association of Machinists* v. *NLRB,* 362 U.S. 411, 422 (1960).

To review whether the Board applied a correct legal test in determining that Pulitzer was a joint employer of the Berberich drivers assigned to the Post Dispatch, we must first determine what test the Board applied. The Board stated that it relied "on the totality of the evidence and note[d] significantly respondent's demonstrated authority to determine labor relations policies and terms and conditions of employment for Berberich's drivers." Unfortunately, without further elucidation this statement does not clearly articulate the standard applied by the Board or the critical **[-6-]** factors it considered in determining whether a joint employer relationship existed. Furthermore, neither the ALJ's decision nor the Board's brief provides further insight into the test applied by the Board.[2]

As stated in *Parklane Hosiery Co., Inc.,* 203 N.L.R.B. 597, 612, *amended on other grounds,* 207 N.L.R.B. 999 (1973):

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[2] The Board's disagreement and corrections of the ALJ's decision precludes its usefulness in this regard. The Board's brief attempts to distinguish between the terms "single employer" and "joint employers" and implies that the only relevant factor is the degree of control over the work of the employees involved. The Board's opinion, however, indicates that it considered factors other than this relevant. **[-7-].**

> This Board's so-called "single employer" or "joint employer" concept defined and codified, with judicial concurrence, within a significant number of cases normally reflects a judgment that two or more nominally separate business entities may properly be considered sufficiently integrated to warrant their unitary treatment, for various statutory purposes.
>
> The principal factors which have normally been deemed relevant, when this Board must decide whether sufficient integration exists, have covered broadly certain demonstrable relationships between the several business entities concerned; the board considers whether their total relationship reveals: (1) some functional interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common worship or financial control. While none of these factors, separately viewed, have been held controlling, stress has normally been laid upon the first three factors which reveal functional integration with particular reference to whether there is centralized control of labor relations.

See also Radio & Television Broadcast Technicians Local Union 1264 v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Southern California Stationers,* 162 N.L.R.B. 1517 (1967).

Applying this test to the relationship between Pulitzer and Berberich as of October 3, 1977, when the Union requested bargaining, we find that substantial evidence on the record as a whole does not support the conclusion that the companies were joint employers of the Berberich drivers assigned to the delivery of the Post Dispatch.

All parties agree that there are no interlocking officers or directors between Pulitzer and Berberich, and that neither has any direct financial interest in the other. Each is organized as a separate and independent company, one a corporation, the

other a family partnership, and their relationship is solely determined by a contract providing for delivery of the Post Dispatch. The contract specifically provides that nothing contained in it shall be construed to suggest that the parties are general partners, limited partners, joint ventures, or joint employers.[3]

The contractual relationship does require some functional interrelation of the operations of Pulitzer and Berberich. Berberich drivers deliver the Post Dispatch when and where Pulitzer determines. They drive trucks bearing a Post Dispatch logo. Occasionally they take directions directly from Pulitzer employees. Pulitzer and Berberich operate under a cost-plus contract. In many ways, however, Berberich operates independently. It maintains its own facilities where Berberich drivers must check in. Assistant managers employed by Berberich direct the drivers' routes and procedures according to a "run sheet" received from the Pulitzer dispatcher. Berberich maintains separate personnel files and is solely responsible for the hiring, disciplining, and firing of its employees. Berberich pays its own liability, property damage, and workers' compensation insurance, and owns the trucks and equipment used for delivery.

In the past, Pulitzer maintained a significant degree of control of the terms and conditions of employment for Berberich drivers delivering the Post Dispatch. Pulitzer and Berberich then deliberately attempted to change the nature of their relationship. Pulitzer substantially withdrew from its role in establishing the terms and conditions of employment of the Berberich drivers by deciding to abstain from participation in the negotiations for the 1976-78 collective bargaining agreement and from participation in the resolution of grievances. In July 1977, it turned over the role of daily supervision of Berberich

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[3] While such language is not necessarily controlling, it can be indicative of the parties' basic intentions and their understanding of the contractual arrangement. **[-8-]**

drivers to Berberich assistant managers.[4] Nevertheless, Pulitzer's director of labor relations, Kanne, at the October 4, 1976, negotiating session, explained the terms of a productivity bonus contained in a collective bargaining agreement with its dock employees, and discussed certain changes that would affect the terms and conditions of Berberich drivers. Also, Pulitzer wrote letters assuring that it would continue to discuss safety problems with the Union and would install a motorized conveyor belt. These letters were considered addenda of the collective bargaining agreement when it was ratified on October 18, 1976.

We do not find that the solitary incident of Kanne's participation in the negotiations on October 4, plus the letters from Pulitzer, warrant the conclusion that Pulitzer determined labor relations policies and the terms and conditions of employment for Berberich drivers. Although the past relationship of the companies may have been susceptible to the conclusion that they had centralized the control of the labor relations concern-

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[4] The ALJ found that the employment of assistant managers created a change in form rather than substance. In reaching his conclusion that Berberich and Pulitzer were joint employers, the ALJ relied primarily upon the effect of their cost-plus contractual arrangement, and even indicated taht Kanne's participation in the negotiations did not have a significant effect upon his ultimate conclusion. That Pulitzer approved the hiring of the assistant managers, and ultimately bore the burden of their cost, does not detract from the substantive nature of the change of operation. The cost-plus contract was created through purely arms-length dealing and Pulitzer's prior approval of hiring the managers was entirely consistent with its contractual right to police reimbursable expenses. *See International Chemical Workers Union Local 483* v. *NLRB,* 561 F.2d 253, 256-57 (D.C. Cir. 1977); *Fidelity Maintenance & Construction Co., Inc.,* 173 N.L.R.B. 1032, 1037 (1968). Furthermore, while Pulitzer dispatchers may occasionally direct a Berberich employee, they do not exercise supervisory authority over Berberich employees. *See Oil, Chemical and Atomic Workers International Union,* 173 N.L.R.B. 1244, 1245 (1968). **[-9-]**

ing the Berberich drivers, their deliberate decision to institute changes is entitled to recognition. *See W. L. Golightly, Inc.*, 172 N.L.R.B. 2155, 2156 (1968). Additionally, we note that even a very substantial qualitative degree of centralized control of labor relations does not in itself determine the joint employer issue. *See Local 627, International Union of Operating Engineers* v. *NLRB*, 518 F.2d 1040, 1046 (D.C. Cir. 1975),[5] *aff'd on this issue sub nom South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976).

This court faced the joint employer issue in the context of an analogous factual situation in *Russom* v. *Sears, Roebuck and Co.*, 558 F.2d 439 (8th Cir.), *cert. denied*, 434 U.S. 955 (1977). After a careful examination of all of the relevant facts, we determined that Sears was not a joint employer of the employees of Dependable Appliance Service, Inc. (DAS). In both *Russom* and the case at bar, the companies maintained a close business relationship. In many respects the business operations in *Russom* were interconnected to a greater extent. DAS performed substantially all of its business for Sears; Sears trained the DAS employees; DAS employees received a discount at Sears stores and participated in Sears employee contests; and there was evidence that DAS was created in an effort to alleviate Sear's previous labor relations problems. We also noted, with special emphasis, that Sears did not sign the collective bargaining agreement and did not participate in any labor negotiations preceding the formation of the agreement. Pulitzer, however, did have minimal participation in labor negotiations, and its let-

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[5] "Although, as pointed out above, centralized control of labor relations is one of the 'controlling criteria,' it is not 'critical' in the sense of being sine qua non of 'single employer' status. *Canton, Carp's Inc., supra* [125 N.L.R.B. 483 (1959)]. The degree to which such control is present (or absent) is, of course, one of the circumstances upon which 'single employer' status depends." 518 F.2d at 1046. **[-10-]**

ters were considered addenda to the agreement. Balancing the totality of relevant evidence in these cases, we find the evidence implicating an existence of a joint employer relationship is substantially similar. In neither case is a finding of joint employer status justified. Both present circumstances vary different from cases finding a joint employer relationship where the companies share direct supervision of the employees involved and control hiring, firing, and disciplining. *See Ace-Alkire Freight Lines, Inc.* v. *NLRB,* 431 F.2d 280, 282 (8th Cir. 1970).

Congress has vested in the courts of appeals the duty to review certain Board determinations. When in our judgment an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law, we must set aside the determination of the **[-11-]** Board and deny enforcement of its order. *See Boire* v. *Greyhound Corp.,* 376 U.S. 473, 477, 481 (1964). The totality of the relevant evidence in this case does not support the conclusion that Pulitzer and Berberich are joint employers. There is no common ownership or management between the companies. Their operations are not substantially interrelated beyond the extent necessary to the performance of the basic contractual duty of Berberich to deliver the newspapers. The evidence is insufficient to show centralized control of labor relations. The degree to which Pulitzer exercises control of the labor policies and terms and conditions of employment of Berberich's drivers is not substantial.

Enforcement denied.

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1433. September Term, 1979

The Pulitzer Publishing Company,

Petitioner,

v.

Petition for Review of Order of the National Labor Relations Board

National Labor Relations Board,

Respondent.

Miscellaneous Drivers and Helpers Union, Local 610, etc.,

Intervenor-Respondent.

The Court having considered petition for rehearing en banc filed by counsel for intervenor-respondent and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 6, 1980